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13 REGAL STONE, LTD.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

Chelsea, LLC, Mark Russo, Allen Loretz, and Ivan Simpson, individually and on behalf of all others similarly situated.

) Case No. C-07-5800-SC  
)  
) DECLARATION OF MICHAEL  
) DUNCHEON IN OPPOSITION TO  
) PLAINTIFFS' MOTION FOR ORDER TO  
) SHOW CAUSE WHY A PROTECTIVE  
) ORDER TO SUPERVISE OR  
) OTHERWISE LIMIT  
) COMMUNICATIONS WITH PUTATIVE  
) CLASS MEMBERS SHOULD NOT ISSUE

Regal Stone, Ltd., Hanjin Shipping, Co., Ltd., Conti Cairo KG, NSB  
Neiderelbe, Synergy Maritime, Ltd. *In Personam*; M/V Cosco Busan, their engines, tackle, equipment appurtenances, freights, and cargo *In Rem*,

) Courtroom: 1, 17<sup>th</sup> Floor  
) Honorable Samuel J. Conti

Defendants.

I, MICHAEL DUNCHEON, declare under penalty of perjury as follows:

1. I am an attorney licensed to practice law before all of the courts in the State of California, as well as the United States District Court, Northern District of California

1 I am a partner in the law firm of Hanson Bridgett Marcus Vlahos & Rudy, LLP, located  
 2 at 425 Market Street, 26th Floor, and San Francisco, California 94105.  
 3

4 2. The oil spill caused by the *M/V Cosco Busan* occurred on November 7, 2007.  
 5 Based on a pre-existing relationship that I had with local crab fishermen, I met with  
 6 some of them after the oil spill to discuss my firm representing them and their  
 7 associations in connection with securing compensation for damages caused by the oil  
 8 spill. In connection with these discussions, we associated John Hillsman, an  
 9 acknowledged maritime law expert, and his firm, McGuinn, Hillsman & Palefsky.  
 10

11 3. As a result of our discussions with local crab fishermen, Hanson, Bridgett  
 12 and McGuinn, Hillsman were retained by each of the associations representing local  
 13 crab fishermen, i.e. Crab Boat Owners Association (San Francisco), Fisherman's  
 14 Marketing Association Incorporated of Bodega Bay, Inc., and Half Moon Bay  
 15 Fishermen's Marketing Association, Inc. Additionally, we have been personally retained  
 16 by 76 local commercial crab fishermen ported out of the ports of San Francisco, Bodega  
 17 Bay, and Half Moon Bay. This number does not include our clients who are deckhands,  
 18 or fishermen who only fish for salmon or halibut or herring. We do not represent non-  
 19 local fishermen, that is fishermen from the Crescent City, California area and fishermen  
 20 from Washington and Oregon, because those fishermen are not similarly situated to  
 21 local fishermen, and there is substantial competition between our clients and non-local  
 22 fishermen.  
 23

24 4. In representing our clients, our focus has been, first and foremost, to secure  
 25 interim compensation for clients who suffered severe hardship as a result of the fact that  
 26 the oil spill delayed the opening of the crab season by approximately 17 days, but we  
 27 have no intention of waiving or prejudicing the right of our clients to file a lawsuit if as  
 28 and when necessary. Prior to filing suit, we contacted the attorneys for the owners of  
 the vessel that caused the spill, Regal Stone, Ltd. (designated the "Responsible Party" by  
 29

1 the U.S. Coast Guard) and a representative of the insurer for the Responsible Party.  
 2 The insurer for the responsible party is Steamship Owners Mutual Protection and  
 3 Indemnity Association, a well-known, financially sound marine protection and  
 4 indemnity association. Its representative with respect to the subject oil spill is Hudson  
 5 Marine Management Services. Hudson Marine Management Services has not in any  
 6 way refused to disclose or hidden the fact that it is representing the insurer for the  
 7 Responsible Party.

8 5. With respect to our efforts to secure interim compensation, we are well  
 9 aware that the Oil Pollution Act of 1990, 33 USC § 2713 ("OPA"), requires that the  
 10 Responsible Party set up a claims process that is designed to provide a mechanism for  
 11 the speedy resolution of claims so as to reduce the potential need for litigation or at least  
 12 limit the scope of litigation. We are of the view that the law provides for strict liability  
 13 in this instance, and that liability for compensatory damages is not reasonably subject to  
 14 dispute in the case of the oil spill caused by the *Cosco Busan*. Accordingly, we believe  
 15 that the prospect of an early resolution of significant issues is realistic and in our clients'  
 16 best interests. We specifically desired to avoid the situation that arose in Alaska  
 17 following the oil spill caused by the *Exxon Valdez*, where litigation has been protracted  
 18 for years without payment to the injured parties.

19 6. While we were determining whether it would be feasible to negotiate an  
 20 interim compensation arrangement on behalf of our clients, we did not "race to the  
 21 courthouse" because, based on preliminary discussions with Hudson Marine, we  
 22 concluded that racing to the courthouse was premature and potentially unnecessary.

23 7. We did not authorize nor did our clients authorize Mr. Audet to file his  
 24 purported class action, allegedly on behalf of all crab and other fishermen, seeking  
 25 damages for the oil spill, and we have a number of serious objections to his purported  
 26 class action. We have concerns with Mr. Audet's overbroad class definition and the

1 potential conflict among putative class members. The substance of the allegations in  
2 Mr. Audet's complaint reflect its hasty preparation and his complaint fails to allege  
3 causes of action that should, in our judgment, be alleged, if as and when it is determined  
4 that litigation is required in this matter. Nor do we necessarily believe that litigation, if  
5 required, should be commenced in federal court. For these and other reasons, there is a  
6 high likelihood that our clients will opt out of Mr. Audet's purported class action, if it is  
7 ever certified as such. (Nor did the clients we represent authorize the purported class  
8 action filed in state court by the law firm of Cotchett, Pitre & McCarthy; since that case  
9 is not filed in this court, but in state court, it is unnecessary to comment on that suit  
10 here.) Depending on the outcome of the claims process described below and assuming a  
11 mechanism is agreed to address continuing and future damages to the crab fishery and  
12 potential punitive damages, it is not clear that a class action is necessary in this case or  
13 that it is superior to the utilization of the claims process. We think that the claims  
14 process should be permitted to work its course without delay, that it may be superior to  
15 a class action or, at least, that, as OPA intended, it may reduce the issues that need to  
16 be litigated. Finally and in any event, compensatory damages in this case to the crab  
17 fishermen must be individually determined, as the amount of damage to each crab  
18 fisherman is unique depending upon a host of individual factors. As an individual  
19 claims process will be required at some point in any event, it is better for the fishermen  
20 that it takes place sooner rather than later.

21       8. On behalf of our clients, Hanson, Bridgett and McGuinn, Hillsman, on the  
22 one hand, and Hudson Marine Management on the other engaged in extensive arm's-  
23 length negotiation to develop a claims process that we believe is expeditious, fair and  
24 reasonable to our clients. We have agreed and have a clear understanding that  
25 participation in the claims process does not involve a waiver of our clients' right to file or  
26 join a lawsuit at any time, if, as, and when they might conclude that the claim process

1 has been unreasonably delayed or that it has produced an outcome that is not acceptable  
2 to a particular fishermen. It is clearly agreed between us and Hudson Marine that, at  
3 this juncture, the claims process only relates to damages suffered prior to December 1,  
4 2007, and that our clients are in no way waiving or prejudicing their right to file a  
5 lawsuit seeking damages for future effects caused by the oil spill or for punitive  
6 damages. I emphasize that our clients have not waived or surrendered their right to  
7 initiate their own action or to participate in class actions which we or others might  
8 initiate or which have been initiated, if they are dissatisfied with and do not accept the  
9 outcome of the claims process.

10 9. In a memorandum in support of their motion to show cause, Mr. Audet  
11 alleges that Hudson Marine has initiated a claims process which is "rife with pretrial  
12 misrepresentations, misleading omissions and coercion." The allegation of "coercion" is  
13 completely unsupported by our experience with this case to date. The claims process  
14 involving the crab fishermen initiated by Hudson was the result of negotiations with us,  
15 and also, I believe, the result of negotiations with other attorneys representing crab  
16 fishermen. It was not unilaterally imposed by the Responsible Party or Hudson Marine.  
17 Nor are we aware of misrepresentations with respect to the claims handling procedures.  
18 One purported "misrepresentation" that Mr. Audet claims to have been made to him is  
19 that participation in the claims process would in no way prejudice rights to bring suit for  
20 damages other than interim damages resolved in the claims process. This  
21 representation, if made, would in our view be correct. Further, pursuit of the claim  
22 process as designed would constitute exhaustion of the OPA requirement, to the extent  
23 the requirement is applicable. (Both Mr. Audet's suit and Mr. Pitre's suit ignore this  
24 OPA requirement as if it were not applicable. By this declaration, I do not admit that  
25 the OPA requirement is applicable to all of the claims which could be brought, but it is  
26 applicable to a claim under OPA and exhausting it at this juncture is advantageous.)

1 The only other purported misrepresentation cited by Mr. Audet is the alleged  
2 representation that there would be no cap on the damages a claimant could receive  
3 through the claims process. The representation was not made to us, but we are well into  
4 the claims process and the insurer is not proposing to impose a cap on individual claims,  
5 or on the aggregate payment of the claims of crab fishermen. The potential qualified  
6 limit on the Responsible Party's aggregate liability under OPA, 33 U.S.C. 2704, only  
7 applies under OPA, not other applicable statutes (33 U.S.C. 2718(c)(1), (2)), and, as  
8 stated, we have no indication at this juncture that the qualified cap either can or will be  
9 applied in a way that would limit our claimants recovery through the claims process. (If  
10 it is invoked and applicable, it would apply to putative class claims in court to the same  
11 extent as it would apply in the claims process, and is not a reason to avoid the claims  
12 process in any event.) And if, contrary to our expectation, the limit comes into play,  
13 under the claims process as we have negotiated it, no claimant is required to accept it  
14 and we and they are free to litigate the damage issues in court. The only alleged  
15 omission on the part of Hudson Marine is the claim that Hudson Marine does not make  
16 it clear that going through the administrative claims process will not involve a waiver of  
17 the right to litigate if as and when necessary. The papers submitted by Mr. Audet do not  
18 reflect that either he or Mr. Pitre contacted Hudson Marine for clarification of this issue,  
19 nor do the papers from Hudson Marine submitted in support of the subject motion reflect  
20 any suggestion that a crab fishermen's right to litigate would be or was being waived, if  
21 he went through the claims process. In any event, in the case of our clients, based on  
22 our negotiations with Hudson, we have a clear agreement that the claims process does  
23 not require a waiver of the right to litigate or participate in class actions in the future if  
24 need be.

25 10. Because of the great hardship caused by the oil spill to crab fishermen,  
26 Hanson, Bridgett and McGuinn, Hillsman negotiated an arrangement with Hudson  
27

1 Marine as part of the claims process whereby the insurer supplied funds in the initial  
2 amount of \$700,000, which we have used to make immediate, partial prepayments to  
3 claimants we represented who supplied certain minimum documentation demonstrating  
4 they were harmed by the oil spill, and who agreed to follow through with the claims  
5 process, subject to the agreement that the process would not prejudice their right to  
6 litigate. Utilizing the insurance company's money, we have distributed so far \$445,000 to  
7 a total of 50 of our clients in \$5,000 and \$10,000 increments, and we expect to distribute  
8 substantially more money as our clients' secure necessary documentation. These  
9 payments are advances or credits against larger sums that claimants will be eligible to  
10 receive through the claims process. This arrangement to expedite significant payments  
11 has been immensely appreciated by and beneficial to our clients. Although we  
12 negotiated the arrangement with Hudson Marine, we understand that Hudson Marine  
13 has offered similar advances under the same conditions to crab fishermen represented  
14 by other attorneys and also to crab fishermen who are acting on their own behalf.

15 11. We are presently preparing and filing claims on behalf of the fishermen for  
16 their full damages for losses resulting from the fact that the oil spill delayed the opening  
17 of the crab season until December 1. Hudson Marine has stated that it intends to pay  
18 valid claims that are appropriately documented and we are in the process of providing  
19 the documentation to establish these claims. (In that regard, if we or if any claimant we  
20 represent do not accept the outcome of the claims process, we and they are at liberty to  
21 file suit and/or to participate in an appropriate legal action that we or others may have  
22 filed or file.)

23 12. Based on our extensive discussions with crab fishermen and in light of  
24 extensive media coverage, I believe that all the local crab fishermen are well aware of  
25 the purported class actions that have been filed in this matter, and that they are also  
26 aware of the various attorneys, including Mr. Audet, Mr. Pitre, myself, and others, who

1 had been active in representing interested crab fishermen. (The fishermen have been  
 2 deluged by attorneys with a financial interest in representing them.) As Mr. Fitz states  
 3 in his declaration: "The San Francisco Bay Area commercial fishing community .... is  
 4 close knit and information travels quickly amongst its members." Consequently, we  
 5 contend it is unnecessary to delay, slow down or interfere with the claims process,  
 6 purportedly to notify fishermen of the pendency of the two class actions. It is also my  
 7 belief, based on interaction with the fishermen, that some fishermen are highly skeptical  
 8 of the class actions, to say nothing of lawyers in general and that some fishermen are  
 9 choosing not to be represented by counsel and wish to pursue the claims process directly  
 10 without the benefit of counsel. In this regard, I suspect that virtually all crab fishermen  
 11 have consulted and are represented by counsel, if they wish counsel. Some simply do  
 12 not. For those crab fishermen who wish to be represented by attorneys, I believe that  
 13 the overwhelming majority of crab fishermen are represented by attorneys other than  
 14 Mr. Audet's firm and Mr. Pitre's firm.

15       13. Hudson Marine has not been "coercive" in our experience, and, as stated  
 16 above, it has not limited the right to obtain an advance or to a file claim to our clients.  
 17 The papers submitted by Mr. Audet and by Mr. Pitre do not indicate that either of these  
 18 attorneys personally contacted Hudson Marine on behalf of their respective individual  
 19 clients, i.e. Chelsea, LLC, or Steven Fitz or John Tarantino, and sought to establish  
 20 eligibility for an advance or sought to submit a claim. It would greatly surprise me if  
 21 Hudson Marine would treat these claimants any differently than it has treated us or our  
 22 clients.

23       14. Speaking for the crab fishermen we represent, there is no justification for  
 24 the Court's involvement in overseeing or delaying the claims process at this juncture. As  
 25 the attorneys for 76 local crab fishermen claimants and their associations, I am satisfied  
 26 that the claims process in its present form is in the interest of my clients and crab

1 fishermen generally; that it has not been the product of misrepresentations, omissions or  
2 coercion; that it may produce results that are expeditious and in amounts that will be  
3 acceptable to many, if not most, of the crab fishermen we represent (and many that we  
4 do not represent); and that it may well serve to limit the claims that have to be  
5 adjudicated in court. But, if I am mistaken or overly optimistic, I am confident that  
6 going through the claims process will not prejudice our clients' right to file a lawsuit or  
7 participate in class actions in the future as circumstances may require, and we certainly  
8 intend to file an appropriate lawsuit at the appropriate time in the appropriate court, if  
9 and when it becomes necessary.

10  
11 I declare under penalty of perjury that the foregoing is true and correct and that this  
12 Declaration was executed on January 23, 2008, at San Francisco, California.

13  
14   
15 MICHAEL A. DUNCHEON